No. 83-1470

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

THE MID-SOUTH GRIZZLIES, *et al.*,
Petitioners,

v.

THE NATIONAL FOOTBALL LEAGUE, *et al.*,
Respondents.

BRIEF OF RESPONDENTS NATIONAL FOOTBALL LEAGUE, *ET AL.*, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a decision by the members of the National Football League not to expand their joint business operations to include an additional League team in a community not presently represented constitutes a violation of either Section 1 or Section 2 of the Sherman Act.

COUNTERSTATEMENT OF THE CASE

One of the petitioners operated a member club of the World Football League in Memphis for the 1974 season and a portion of the 1975 season. When the World Football League discontinued its operations in late 1975, petitioners reorganized that club and demanded that they promptly be granted a

franchise to operate a National Football League ("NFL") club in Memphis. At that time, the NFL was in the final stages of almost three years of planning for the creation of two new franchises in 1976 in Seattle and Tampa Bay. Nevertheless, the League promptly arranged for petitioners to meet with its Expansion Committee (in December 1975), with other League representatives, and with the NFL's entire membership (in January 1976). A-38-39; 550 F. Supp. at 560-61.[1] Petitioners thus had a full opportunity to persuade the NFL member clubs that the League should—without pre-planning—engage in the kind of large-scale expansion that had negatively affected other sports leagues. A-55; 550 F. Supp. at 568.

On the Expansion Committee's recommendation that further enlargement of the NFL was then unwarranted, the NFL's Executive Committee concluded in March 1976 that such further expansion would be unprecedented and precipitous, that serious labor-management disputes and other severe operating problems first had to be resolved, and that the proposed expansion to Memphis (which would have required the addition of another NFL club as well) was contrary to the NFL's best interests. A-39-40, 45; 550 F. Supp. at 561, 563-64. Petitioners were promptly advised of the NFL's decision.

Nearly four years later, in December of 1979, petitioners commenced this action, claiming that the decision not to enlarge the League to include a Memphis member club constituted a violation of both Section 1 and Section 2 of the Sherman Act. A-89-111. Petitioners made no claim that the NFL was in any way responsible for the demise of the World Football League.

After both sides had engaged in considerable discovery, the NFL moved for summary judgment on the ground that petitioners had not shown and could not show any restraint on commercial competition—a requisite element of a Sherman Act

[1] The District Court's opinion is reported at 550 F. Supp. 558 (E.D. Pa. 1982). The opinion of the Third Circuit is reported at 720 F.2d 772 (3d Cir. 1983).

violation. After full briefing and argument, the District Court denied the NFL's motion without prejudice to renewal and directed petitioners to address further discovery to the NFL's decision not to grant petitioners' franchise application and to the NFL's prior practices and standards with respect to League expansion decisions. A-11, 48; 720 F.2d at 777; 550 F. Supp. at 565. When that discovery was concluded, the NFL renewed its motion for summary judgment, which the District Court granted on the ground that the League's action had not restrained commercial competition in any manner.

The District Court found that petitioners were not competitors of the NFL or its member clubs and were not "injured by any anticompetitive behavior of defendants" (A-55; 550 F. Supp. at 568); that the NFL had "substantial business reasons not to plan any further expansion" when petitioners had applied (*Id.*); that petitioners' primary objective was to participate with the other NFL teams in the joint production of NFL football and to share fully in the proceeds earned by the NFL's members, not to engage in competition with the members; and that "the denial upon demand of a new National Football League franchise to a qualified person does not run afoul of the antitrust laws." A-62; 550 F. Supp. at 572.

The Court of Appeals, in a comprehensive opinion (A-1-31), affirmed the decision of the District Court as to petitioners' claims under both Sections 1 and 2 of the Sherman Act, and also rejected petitioners' contention that it should have been allowed further discovery and a trial on asserted factual issues. In rejecting this contention, the Court of Appeals considered each of the factual issues asserted by petitioners and found that none was relevant to the establishment of a restraint on commercial competition, the absence of which was fatal to petitioners' contention.

REASONS FOR DENYING THE WRIT

The Third Circuit's decision, which carefully reviewed and unanimously rejected petitioners' legal and factual claims, rests on settled antitrust principles, is clearly correct, and does not present any issue that warrants further review by this Court.

I. THE THIRD CIRCUIT CORRECTLY RULED THAT THE DECISION OF THE NATIONAL FOOTBALL LEAGUE NOT TO EXPAND THE LEAGUE'S OPERATIONS RESTRAINED NO COMMERCIAL COMPETITION

The Sherman Act prohibits conduct that unreasonably restrains competition; Section 1 applies to concerted action by competitors and Section 2 to single firm conduct. The essential ingredient, however, of every Sherman Act violation is a restraint on commercial competition. *Brown Shoe Co., Inc.* v. *United States*, 370 U.S. 294, 320 (1962); *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977). The courts below went to the jugular in this case in determining, without unnecessary excursions into irrelevant issues, that petitioners' complaint and supporting submission did not in any respect present a triable issue concerning any restraint on competition. As the Court of Appeals put it, petitioners assert no Sherman Act claim "[s]ince on the record before us the Grizzlies have shown no actual or potential injury to competition resulting from the rejection of their application for an NFL franchise . . . ." A-30; 720 F.2d at 787.

In analyzing petitioners' claims, the Court of Appeals properly noted that an antitrust plaintiff must assert "adverse, anticompetitive effects within relevant product and geographic markets" (A-22; 720 F.2d at 783) and that "Sherman Act liability requires an injury to competition." A-26; 720 F.2d at 785. The court then fully considered petitioners' claims as to the two categories of commercial competition susceptible of restraint in a sports league context: (1) extra-League competition; and (2) intra-League competition.

As for extra-League competition, the Court of Appeals noted that "[n]o claim is made that abuse of NFL market power led to the demise of the World Football League . . . ." A-24; 720 F.2d at 784-85. The court also found that the NFL had acquired its assertedly dominant position in the marketplace under the express authority of a 1966 federal statute (A-23; 720 F.2d at 784) and that the NFL's decision not to enlarge the League's operations on petitioners' demand was "patently procompetitive" in a national market for competition between professional football leagues. A-27; 720 F.2d at 786.

As for possible restraints of intra-League competition, the Court of Appeals initially identified certain competitive issues *not* raised by petitioners: (1) there was no claim of violation "from the exclusion of potential competitors in the designated exclusive home territories" of NFL member clubs; (2) there was no complaint "that the NFL's 60-40 home team-visitor revenue-sharing arrangement" caused any injury to petitioners; and (3) there was no complaint "about the operation of the NFL arrangements for joint sale of television rights" made under a 1961 federal statute. A-9-10; 720 F.2d at 776.

The court then turned to petitioners' claim that "there nevertheless remains a not insignificant amount of intra-League non-athletic competition." A-28; 720 F.2d at 786. It noted, however, that petitioners made no claim of such competition with the NFL's St. Louis member club, located almost three hundred miles from Memphis, or with any other more distant NFL club. The courts below concluded, therefore, that the NFL's decision not to expand further on petitioners' demand imposed no restraint on any local or regional competition between petitioners and the NFL itself or any NFL member club. Indeed, as both courts recognized, petitioners remained free to join in the establishment of a league that would compete with the NFL and other entertainment producers.[2]

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[2] In fact, as the District Court noted, participants in petitioners' group are investors in the currently operating United States Football League. A-59; 550 F. Supp. at 570.

Petitioners' claim that the NFL constitutes an "essential facility," whose conduct should be governed by that limited antitrust principle (Pet. 23-25), was fully reviewed and emphatically rejected by the lower courts. The District Court correctly observed that the "essential facility" doctrine [3] requires a claimant to show that he is being denied "access to something necessary . . . to engage in business which is controlled by his *competitors.*" A-58; 550 F. Supp. at 569-70 (emphasis original). In affirming, the Court of Appeals properly concluded that the essential facility doctrine had no application here simply because petitioners "failed to show how competition in any arguably relevant market" was impaired by their inability to join in the NFL's operations. A-30; 720 F.2d at 787. In so concluding, moreover, the court expressly found no need to address the broader, fundamental question—which petitioners now urge upon this Court—of whether "there can never be competition among league members." A-28; 720 F.2d at 787 & n.9.

The absence of any identifiable restraint on commercial competition also supports the lower courts' conclusion that the "trade association" cases have no application here. Pet. 18, 25-26; Supp. Br. 4. Such cases hold that when independent horizontal competitors are permitted to engage in limited forms of joint activity of competitive advantage, they may not arbitrarily or unreasonably exclude other similarly situated businesses with whom they compete. At the time of their application for NFL membership, petitioners were not business competitors of any NFL member club—nor did they seek to join the League in order to compete in any economic or business sense. Rather, as petitioners' complaint and the undisputed record demonstrated, the Grizzlies sought to *share* in the benefits of the NFL's joint operations and to participate,

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[3] *See, e.g.*, Otter Tail Power Co. v. United States, 410 U.S. 366 (1973); Hecht v. Pro-Football, Inc., 570 F.2d 982 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 956 (1978).

on an equal basis, in the League's revenue-sharing program. A-60, 29-30; 550 F. Supp. at 570-71; 720 F.2d at 787.[4]

Petitioners now seek to argue that the NFL's decision on their application presented triable issues of competition in a "market" for national broadcast revenues. Pet. 18-23. Petitioners did not, however, make any such contention in the District Court, and the complaint identified no such market. A-97-99. The Court of Appeals thus concluded that no such issue was presented. A-9-10; 720 F.2d at 776. In any event, as the courts below recognized, the NFL's joint, League-wide sale of television rights to the networks is accomplished under a

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[4] The leading scholarly commentary fully analyzes and rejects the argument that the trade association cases somehow require a sports league to apply "non-arbitrary criteria" in deciding who will be allowed to participate in the enterprise:

> "The gravamen of complaints directed against such organizations [as trade associations and licensing boards] is that their admissions practices limit the economic opportunities of potential competitors .... *The admission practices of sports leagues present a different concern. An analysis of the relationship between clubs within a league suggests that the various league members do not compete with one another in an economic sense .... Thus a decision on access to membership is basically a decision as to whether particular individuals (or their business entities) will be allowed to participate in the partnership venture.* Since the various members pool their efforts and do not engage in economic competition with one another, *an adverse decision on membership in the usual case has no appreciable impact on the level of competition which will take place ....*"
>
> "[Does] present legal doctrine require those who operate a joint business venture to have an obligation to apply non-arbitrary criteria in deciding who will be allowed to participate in the enterprise .... [T]he answer appears to be *no*. Once the concern for an adverse effect on competition is set aside, there is literally no case law which suggests that a group of investors is limited in its discretion to decide who will be given access to its mutual venture."

J. Weistart and C. Lowell, *The Law of Sports* 314-15 (1978) (footnotes omitted) (last emphasis in original; remaining emphasis supplied). *See also* R. Bork, *The Antitrust Paradox* 332 (1978).

1961 federal statute expressly exempting such sales from the antitrust laws. 15 U.S.C. §§ 1291-1295 (1976). A-85-87.[5] It is also undisputed that all NFL clubs equally share all League network television revenues and are not economic rivals in this sphere. Accordingly, no issues are presented here as to any restraint in a market for national broadcast revenues.

Little comment is necessary regarding petitioners' claim that the NFL's decision violated Section 2 of the Sherman Act, 15 U.S.C. § 2 (1976). In the absence of a restraint on competition, Section 2 imposes no restriction on the NFL's conduct.[6]

Petitioners failed to show that any business competition was restrained by the NFL's decision not to extend membership to the Grizzlies. To the contrary, as both lower courts noted, the NFL's decision was manifestly procompetitive in that it left open "the Memphis home team market . . . for potential competitors." A-31; 720 F.2d at 788. Petitioners did not seek to enter any market in order to compete, either with the NFL or any member team—rather, they sought to become joint participants in and to obtain all the rewards possible from full participation in the League's joint operations. Neither principle nor logic supports such a Section 2 claim.

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[5] Petitioners' assertion of a conflict with Board of Regents v. National Collegiate Athletic Ass'n, 707 F.2d 1147 (10th Cir.), *cert. granted*, 104 S. Ct. 272 (1983), is without merit. The college football organizations do not operate under the authority of the 1961 television statute (or any similar statutory provision), and the television marketing restrictions complained of in the NCAA case do not exist within the NFL.

[6] Even *assuming* that the NFL had monopoly power, the courts below properly recognized that it is the *abuse* of monopoly power, rather than its mere existence, that the Sherman Act proscribes. A-61-62, 30-31; 550 F. Supp. at 571-72; 720 F.2d at 788; *see also* United States v. Grinnell, 384 U.S. 563, 571 (1966); Official Airline Guides, Inc. v. FTC, 630 F.2d 920, 926-28 (2d Cir. 1980), *cert. denied*, 450 U.S. 917 (1981); Byars v. Bluff City News Co., 609 F.2d 843, 853 (6th Cir. 1979).

II. SUMMARY JUDGMENT IS PROPER IN ANTITRUST CASES, AND WAS PARTICULARLY APPROPRIATE ON THE UNDISPUTED RECORD OF THIS CASE

In concluding that petitioners' complaint should be dismissed on summary judgment, both the District Court and the Court of Appeals proceeded with unusual care and in clear recognition of the controlling summary judgment standards as stated by this Court. The District Court, for example, expressly invoked and applied the standards of *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962) (A-46; 550 F. Supp. at 564), and *First National Bank of Arizona* v. *Cities Service Co.*, 391 U.S. 253 (1968). A-47; *id.*[7] The Court of Appeals further gave petitioners the benefit of every doubt, applying the requirements of Rule 56 (*see Cities Service, supra*, 391 U.S. at 288-90) notwithstanding petitioners' failure to file the required Rule 56(f) affidavit and on the assumption that petitioners' contention as to the inappropriateness of a summary disposition deserved consideration even in the absence of the required affidavit. A-16-17; 720 F.2d at 779-80.

The District Court's handling and evaluation of the summary judgment and discovery issues in this case clearly met the standards of *Cities Service, Poller,* and other controlling authorities.[8] In contrast, petitioners repeatedly failed to respect the requirements of Rule 56. While failing to file the required Rule 56(f) affidavit, petitioners contended below that the allegations in their complaint alone, without more, shifted to respondents

[7] The District Court noted its duty to "resolve all doubts as to the existence of genuine issues of fact against the moving party, and view all inferences from the facts in the light most favorable to the parties opposing the motion." A-46; 550 F. Supp. at 564.

[8] *See* Adickes v. S. H. Kress & Co., 398 U.S. 144, 158-61 (1970); and Norfolk Monument Co., Inc. v. Woodlawn Memorial Gardens, Inc., 394 U.S. 700, 702-03 (1969). *See also* the District Court's discussion of the authorities, including Harold Friedman, Inc. v. Kroeger, 581 F.2d 1068, 1071 (3d Cir. 1978); Lupia v. Stella D'Oro Biscuit Co., Inc., 586 F.2d 1163, 1167 (7th Cir. 1978), *cert. denied*, 440 U.S. 982 (1979); and Mutual Fund Investors, Inc. v. Putnam Management Co., 553 F.2d 620, 624 (9th Cir. 1977). A-45-48; 550 F. Supp. at 564.

the burden of proof and that the District Court was required to accept these allegations as true. Despite Rule 56(e)'s express requirement that a party opposing a motion "may not rest upon the mere allegations . . . of his pleading," petitioners persisted in this contention even after its error was drawn to their attention. A-138-39; *see also* A-134.

The Court of Appeals gave detailed scrutiny to petitioners' contention that they were denied adequate discovery. Pet. 11-13. Far from finding error, the Third Circuit's review highlighted a central deficiency of petitioners' case: the additional discovery sought could not have enabled the Grizzlies to demonstrate a material factual dispute on the issue of whether the NFL's decision had restrained actual or potential economic competition.[9] In reaching this conclusion, the Third Circuit reviewed in unusual depth *each* of petitioners' outstanding discovery requests. A-17-22 n.5; 720 F.2d at 780 n.5. Both courts below also expressly considered and rejected petitioners' contention that a triable issue of motivation was presented. A-56-57, 27; 550 F. Supp. at 569; 720 F.2d at 786.

At the close of its painstaking analysis, the Third Circuit concluded:

> "Considering the already large record compiled prior to its consideration of the summary judgment record, the absence of a Rule 56(f) affidavit, the irrelevance of most of the pending discovery requests, and the conjectural nature of the Grizzlies' contentions as to the possibility of establishment of actual or potential competition in any arguably relevant market, we conclude that the [district] court did not err in

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[9] For example, the Court of Appeals expressly found that:

"There is no indication that a professional football business located at Memphis, Tennessee would compete with any NFL member for . . . peripheral sources of revenue. The Grizzlies do not contend that the league members (or the Grizzlies themselves if they were admitted to the league) compete for rather than share in network television and ticket sale revenues." A-15; 720 F.2d at 779.

considering the motion for summary judgment on the present record." A-18-21; 720 F.2d at 781.

Accordingly, summary judgment in the circumstances of this case is entirely appropriate and the holding of the Third Circuit need not be further reviewed.

III. WHILE OTHER COURTS HAVE HAD UNUSUAL DIFFICULTY IN APPLYING THE SHERMAN ACT'S "CONSPIRACY" PROVISIONS TO BASIC PROFESSIONAL SPORTS LEAGUE ISSUES, THE THIRD CIRCUIT'S DECISION NEITHER PRESENTS SUCH AN ISSUE NOR CONFLICTS WITH THE NINTH CIRCUIT'S DECISION IN THE *LOS ANGELES COLISEUM* CASE

Contrary to petitioners' contention (Pet. 10; Supp. Br. 2-5), the intervening decision by the Court of Appeals for the Ninth Circuit in *Los Angeles Memorial Coliseum Commission* v. *National Football League*, 1984-1 Trade Cas. (CCH) ¶ 65,879 (9th Cir. 1984) (*"LA Coliseum"*), does not warrant review of the Third Circuit's decision by this Court. In the *LA Coliseum* case,[10] the NFL defendants and Oakland parties have filed petitions for reconsideration and rehearing en banc; a response to the petitions, ordered by the court, has been filed; and the case remains under consideration by the Ninth Circuit. Thus there remains a prospect that the decision of the majority of the Ninth Circuit panel will not be adopted.

More important, the issues as to which the Courts of Appeals are said to be in conflict (Supp. Br. 4-5) were not resolved by, and are not essential to, the decision of the Third Circuit below. Those issues, which were essential to the Ninth Circuit's decision in the *LA Coliseum* case, are: *first*, whether the internal NFL arrangements among the League's member clubs designating the home location of each club constitute a "contract, combination, or conspiracy" among independent horizontal competitors or whether, alternatively, they constitute lawful arrangements among participants in a joint venture or common enterprise; and *second*, whether, if such arrangements

[10] Set forth in the Appendix to petitioners' Supplemental Brief.

may—under some circumstances—constitute "conspiracies" under Section 1 of the Sherman Act, the reasonableness of such arrangements is to be determined under the standards developed for testing the reasonableness of agreements among horizontal competitors even though, as the Ninth Circuit put it, "the NFL teams are not true competitors, nor can they be." Supp. App. A-17; 1984-1 Trade Cas. at 67,678.[11]

As to the first issue, a majority of the Ninth Circuit panel rejected the NFL's contention that its member clubs were not independent competitors acting by "conspiracy" when they determined to continue the operations of an existing League team in the community designated in the League's Constitution. The majority held that such arrangements among the League's members as to the "home" location of each constituted an agreement among horizontal competitors that unlawfully restrained competition in both a local football market and a national stadium market in violation of Section 1 of the Sherman Act. The dissenting panel member concluded, in contrast, that the NFL is "a single entity for purposes of intra-league regulation of relocation of existing franchises" (Supp. App. A-56; 1984-1 Trade Cas. at 67,692), that "virtually every court to consider [the business relationship among NFL members] has concluded that NFL member clubs do *not* compete with each other in the economic sense," and that "[t]he majority's holding places the Ninth Circuit's ruling in conflict with every other circuit to consider this question." Supp. App. A-45-47; 1984-1 Trade Cas. at 67,688-689.

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[11] In a variety of contexts, the lower federal courts have reached conflicting conclusions as to the nature of the business relationship within a professional sports league. *See, e.g.*, North American Soccer League v. National Football League, 670 F.2d 1249, 1251 (2d Cir.), *cert. denied*, 103 S.Ct. 499 (1982) (NFL a "joint venture"); Smith v. Pro Football, Inc., 593 F.2d 1173, 1179 (D.C. Cir. 1978) ("NFL clubs . . . are not competitors in any economic sense"); Mackey v. National Football League, 543 F.2d 606, 619 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977) (NFL has "some characteristics of a joint venture"). *See also* San Francisco Seals, Ltd. v. National Hockey League, 379 F. Supp. 966, 970 (C.D. Cal. 1974) (hockey league a "single unit"); Levin v. National Basketball Ass'n, 385 F. Supp. 149, 150 (S.D.N.Y. 1974) (basketball league "a joint venture"; teams are "dependent upon one another as partners").

With respect to the second issue, the Ninth Circuit majority held that the reasonableness of internal sports league arrangements was to be evaluated by the same standards applied to agreements among independent horizontal competitors, including requirements of objectivity, procedural regularity, and "less restrictive" alternatives.[12] Such an approach, which rejects the joint venture and ancillary restraint aspects of sports league operations, is sharply at odds with Justice Rehnquist's observations in his dissent from the denial of certiorari in *National Football League* v. *North American Soccer League,* 103 S. Ct. 499 (1982).[13]

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[12] Such considerations may be relevant only to the degree that they relate to the impact of a challenged agreement on competition. *See* Continental TV, Inc. v. GTE Sylvania Inc., 433 U.S. 36, 58 n.29 (1977). The Ninth Circuit, however, made no finding that the supposed procedural infirmities of the NFL's arrangements on the location of its teams had any effect whatsoever on competition in any relevant market.

[13] Commenting on the application of ancillary restraint concepts to the NFL's internal ownership policies involved in that case, Justice Rehnquist noted:

> "The [NFL] cross-ownership rule, then, is a covenant by joint venturers who produce a single product not to compete with one another. The rule governing such agreements was set out over 80 years ago by Judge (later Chief Justice) Taft: A covenant not to compete is valid if 'it is merely ancillary to the main purpose of a lawful contract, and necessary to protect the covenantee in the enjoyment of the legitimate fruits of the contract, or to protect him from the dangers of an unjust use of its fruits by the other party.' United States v. Addyston Pipe & Steel Co., 85 F. 281, 282 (C.C.A. 6, 1898), *aff'd as modified,* 175 U.S. 211, 20 S. Ct. 96, 44 L. Ed. 136 (1899) . . . . "
>
> "The Court of Appeals also faulted the NFL for failing to show that its restriction was as narrow as possible. Although the Court of Appeals did not cite any authority for this objection, it seems to be relying on the requirement of *Addyston, supra,* that the restraint be 'necessary to protect the covenantee.' 85 F., at 282. The Court of Appeals has taken this statement too far by adopting the least restrictive alternative analysis that is sometimes used in constitutional law. The antitrust laws impose a standard of reasonableness, not a standard of absolute necessity." *Id.* at 501-02.

See also S. Robinson, Recent Antitrust Developments—1979, 80 Col. L. Rev. 1, 15-22 (1980).

Here, however, the Third Circuit, in rejecting petitioners' claims, did not reach either of these issues. The Third Circuit explicitly stated that its decision did not depend upon acceptance of the League's position as to the lack of competition between the members in the resolution of intra-League matters. A-28; 720 F.2d at 786-87. The court *assumed* that the member clubs may be competitors in some respects, but rejected petitioners' claims because petitioners failed to show the requisite competition in any relevant product or geographic market between NFL members and a potential League team in Memphis. The Third Circuit's decision thus rests not upon the League's position as to the inherently joint character of League ventures and the absence of intra-League competition—the central issue in the Ninth Circuit case—but upon petitioners' failure to identify any phase of actual or potential competition between a team in Memphis and any League member that had been restrained to petitioners' injury. In addition, having found no restraint, the Third Circuit did not consider the standards to be used in assessing the reasonableness of any restraint.

The dissenting member of the Ninth Circuit panel in *LA Coliseum,* who accepted the League's position as to the joint or unitary nature of the sports league relationship, did cite with approval passages from the District Court's opinion in this case. Supp. App. A-46, 50, 53; 1984-1 Trade Cas. at 67,688, 67,690-92. Those passages and other statements by both of the courts in this case do suggest acceptance of the NFL's position that in the resolution of intra-League matters the member clubs are not horizontal business competitors but common venturers engaged in the joint production of a single League product.[14] Accordingly, it may be that the Third Circuit, faced with the issue presented to the Ninth Circuit in the *LA Coliseum* case, would concur with the dissenting member of the Ninth Circuit panel and rule in the League's favor.

[14] The Third Circuit stated, for example, that "[f]or the most part the congressionally authorized arrangements under which the NFL functions eliminate competition among the league members. Indeed it is undisputed that on average more than 70 percent of each member club's revenue is shared revenue derived from sources other than operations at its home location." A-28; 720 F.2d at 786.

Should the Ninth Circuit adopt or let stand the application of Section 1 of the Sherman Act to NFL operations that has been announced by a majority of a panel of that court, it would then be most appropriate for this Court to issue a writ and clarify the application of the Sherman Act to internal arrangements among members of sports leagues.[15] However, the instant case—involving only the question of whether the Sherman Act assures favorable action on an applicant's request to enlarge a league—presents no comparable issues that warrant review by this Court.

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[15] Although this Court has on several occasions considered *whether* professional sports leagues are *exempt* from the antitrust laws, *see* Flood v. Kuhn, 407 U.S. 258 (1972); Toolson v. New York Yankees, Inc., 346 U.S. 356 (1953), it has never considered *how* the antitrust laws should *apply* to the admittedly unique business relationship within such leagues. From enactment of the Sherman Act until the late 1950's, it was largely accepted that the antitrust laws did not extend to professional league sports, *see* Radovich v. National Football League, 352 U.S. 445 (1957), and little antitrust law developed in those decades with respect to sports league issues. As a result, the lower courts—recently inundated with such issues—have often been at sea and felt compelled to look to horizontal competitor relationships for precedential guidance, with the result that their decisions often do not reflect any coherent antitrust doctrine or the business realities of sports leagues.

CONCLUSION

This Court has consistently emphasized that the antitrust laws deal exclusively with restraints on commercial competition in the marketplace; they do not purport to afford remedies for all losses or wrongs that parties may assert have occurred in interstate commerce. *Hunt* v. *Crumboch*, 325 U.S. 821, 826 (1949). Both courts below applied this settled principle to the allegations of petitioners' complaint. Both concluded without dissent that no triable issue concerning any restraint of competition was presented—and that petitioners did not in any manner "set forth specific facts showing that there [was] a genuine issue for trial." Rule 56(e), F.R. Civ. P.

For the reasons stated, the petition for a writ of certiorari should be denied.

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